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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,
v.
DARRELL DARDEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Twenty-Second Judicial District Court for the Parish of Washington, State of Louisiana

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In their opposition brief, respondents attempt to answer KCS's argument in three ways. First, unable to justify the state court's decision in any other way, they create a new requirement for express pre-emption under the Federal Railroad Safety Act ("FRSA") out of whole cloth. Next, implicitly conceding that the state court was required to (but did not) make FRSA pre-emption determinations claim by claim, respondents argue that certain aspects of their individual claims justified the court's pre-emption ruling. And finally, lacking any support from this Court for their arguments, respondents instead rely upon two state appeals court cases which likewise flouted this Court's opinion in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993). Respondents' arguments should be rejected and the petition granted to resolve the important question presented.

1. Respondents argue that the trial court's decision, which rejected KCS's pre-emption argument based on unenumerated "things" in plaintiffs' complaint, actually comported with this Court's decision in *Easterwood*. To support their argument, however, respondents are forced to read into *Easterwood* an entirely new requirement for express FRSA pre-emption—a requirement not enumerated by this Court in *Easterwood*, nor by any court since.

The FRSA's express pre-emption clause provides that state laws, rules, regulations, orders, or standards relating to railroad safety may remain in place only "until the Secretary of Transportation prescribes a regulation or issues an order *covering the subject matter* of the State requirement." 49 U.S.C. § 20106 (emphasis added). Thus, as KCS pointed out in its opening brief, the pertinent question in FRSA pre-emption analysis is whether the Secretary of Transportation has issued regulations which cover the subject matter—that is, "substantially subsume"—Louisiana negligence law pertaining to railroad cars transporting hazardous materials. *See* Pet. 15; *Easterwood*, 507 U.S. at 664. And as KCS discussed at length in its opening brief, the extensive regulations issued by the Secretary under the FRSA and the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 *et seq.* ("HMTA"), substantially subsume each and every one of plaintiffs' specific claims against the railroad. *See* Pet. 15-18.

Respondents, however, argue that *Easterwood* demands more. In their opposition brief, respondents repeatedly claim that for the FRSA to pre-empt state law, not only must federal regulations "cover the subject matter" of the law; the state law must also "impede[] or frustrate[]" the federal provisions. Opp. 11; *see also id.* (plaintiffs' state law claims do not "frustrate * * * or conflict with" federal regulations); *id.* 12 (KCS "must show that the Louisiana tort law * * * would specifically operate to impede or impair a federal regulatory provision"); *id.* 15

(*Easterwood* reflects "purpose of pre-emption: to set aside state law which competes with and frustrates applicable federal law"); *id.* 18 (KCS must show Louisiana tort claim "conflicts with a federal regulation in an area or on a subject substantially subsumed by that federal regulation"). This misreading of *Easterwood* is most apparent on page 17 of respondents' brief. After advancing the settled propositions that express pre-emption is available only where Congress clearly intends, and that the FRSA pre-empts state law only where it "substantially subsumes" the subject matter of the state law in question, respondents suggest that "express preemption under the FRSA is *further* reserved for cases in which there is an attempt to apply state tort law in a way which frustrates, contradicts, or is in conflict with, federal law or regulatory interests." Opp. 17 (emphasis added).

Respondents err. This Court's *implied* pre-emption jurisprudence demands that a state law "actually conflict" with federal law before it is pre-empted. *See Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983); *see generally Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 516-517 (1992).[1] But where an *express* pre-emption provision exists, as it does in this case, the language of the statute itself "contains the best evidence of Congress' pre-emptive intent." *Easterwood*, 507 U.S. at 664. The FRSA's express pre-emption clause requires no showing that a state law conflict with, interfere with, impede, or frustrate federal law—only that federal law cover the subject matter of the state law in question.[2]

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[1] A federal statute may also impliedly pre-empt state law if the federal law so thoroughly occupies a legislative field "'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Fidelity Fed. Sav. & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

[2] Respondents' argument more properly is addressed to the FRSA's savings clause, which allows an "additional or more

What's more, the invocation of state tort law covering the same subject matter as a dense network of federal regulations, as in this case, *does* "impair" and "frustrate" Congress's purpose in enacting the FRSA. The federal government has long intended—for over a hundred years—that railroads and railroad safety be subject to uniform regulation. *See R.J. Corman R.R.* v. *Palmore*, 999 F.2d 149, 151-152 (6th Cir. 1993) (noting "Congress's general intent that railroads should be regulated primarily on a national level through an integrated network of federal law"). The express purpose of the FRSA, in fact, is to "promote safety in *every area* of railroad operations," 49 U.S.C. § 20101 (emphasis added), and the statute itself states that "[l]aws, regulations and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106; *see also Donelon* v. *New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.) ("The ultimate goal of the Act is to establish nationally uniform control of railroad safety"), *cert. denied*, 414 U.S. 855 (1973).

The FRSA has prescribed and delimited the role of the States in regulating railroad safety. Where, as here, a network of railroad safety and hazardous-waste regulations blankets the subject matter of plaintiffs' tort claims, the tort claims must give way. *See* Pet. 4-7 & n.5 (discussing extensive federal railroad safety regulatory scheme); *id.* 17 (discussing implied pre-emption).

2. Pointing to various individual claims in their complaint, respondents next argue that the state court was correct to reject KCS's pre-emption defense across the board. Opp. 19-21. In arguing claim by claim, however, respondents implicitly concede that *Easterwood* required

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stringent" state railroad safety law to remain in effect if, among other things, the state law "*is not incompatible with a* [*federal*] *law, regulation, or order.*" 49 U.S.C. § 20106 (emphasis added). The savings clause is not at issue in this case. *See* Pet. 8-9 n.6; *Easterwood*, 507 U.S. at 675.

the trial court to make claim-by-claim pre-emption determinations. Instead, the court vaguely concluded that certain unenumerated "things" in plaintiffs' complaint were not subsumed by federal law—and that plaintiffs' complaint, *in its entirety*, therefore survived KCS's pre-emption challenge. To determine whether a complaint containing multiple claims is pre-empted under the FRSA, the trial court was required to examine *each* claim to determine whether federal regulations cover the subject matter of that claim. *Easterwood*, 507 U.S. at 665; *see also Cipollone*, 505 U.S. at 523-524 (Court's pre-emption analysis addressed "each category of damages actions in turn"); *Bryan* v. *Norfolk & W. Ry.*, 154 F.3d 899 (8th Cir. 1998) (analyzing each claim of negligence separately for FRSA pre-emption). Because plaintiffs' individual claims against KCS involved several different subject matters—namely, the transportation of hazardous materials, inspection of tank cars, hiring and training of hazardous materials employees, and proper public-sector notification and emergency procedures—*Easterwood* required the trial court to address and resolve KCS's pre-emption defense as to each claim.

3. Respondents repeatedly suggest that KCS may not assert a pre-emption defense against the "generally-pled allegations" in their complaint. *See, e.g.*, Opp. 19. General or not, respondents' allegations are what they are: each claim accuses KCS of violating its common law duties with respect to subject matters amply covered by federal regulations. Respondents should not be heard to suggest that other, unenumerated claims—claims not raised after multiple amendments of the complaint, no less—could withstand FRSA pre-emption, when the claims they now raise clearly cannot.

4. Finally, respondents look to two Louisiana appeals court cases to justify the decision below. Those cases prove only that Louisiana has ignored *Easterwood*'s dictates more than once, confirming the need for review by

this Court. *See* Pet. 19-20 (noting that "[t]his is not the first time the Louisiana courts have misapplied *Easterwood* * * * to foreclose a legitimate pre-emption defense"). In *Haydel* v. *Hercules Transport, Inc.*, 654 So.2d 418 (La. App.), *writ denied*, 656 So.2d 1019 (La. 1995), the court of appeals reviewed the pre-emption provisions of the HMTA in light of a state tort claim for punitive damages under Article 2315.3 of the Louisiana Code. Substantively different from those of the FRSA, the HMTA's pre-emption provisions provide that a state requirement is pre-empted by federal law if complying with the state requirement is "not possible," or if the state requirement poses an "obstacle" to the purposes of the HMTA. 49 U.S.C. § 5125. A state law "not substantively the same" as the federal statutes or regulations is also pre-empted under the HMTA if it addresses, *inter alia*, the classification, packing, and shipping of hazardous materials. *Id.* § 5125(b); *see also* Pet. 9 n.7 (discussing HMTA pre-emption provisions).

Concluding that the state damages statute provided a "remedy for individual persons" that the HMTA did not, the court of appeals held that the statute did not pose an obstacle to the HMTA's purposes and "address[ed] totally separate and distinct subject matters" than those enumerated in Section 5125(b). This holding directly contradicts *Easterwood*, where this Court—despite the lack of compensatory remedies in the federal statutory scheme—concluded that a state tort action was nonetheless pre-empted by the complex network of federal regulations covering the subject matter of the plaintiff's claims.

The Louisiana appeals court compounded its error in *In re New Orleans Train Car Leakage Fire Litig.*, 671 So.2d 540 (La. App.), *writ denied*, 675 So.2d 1120 (La.), *cert. denied*, 117 S. Ct. 512 (1996), an FRSA pre-emption case with the same state punitive damages statute at issue. Although *New Orleans Train Car* in-

volved FRSA rather than HMTA pre-emption, the court of appeals simply adopted the reasoning of the *Haydel* court, concluding that the FRSA's penalty provisions and the state damages statute had "different purposes." *See* 671 So.2d at 546. As KCS observed in its opening brief, this was clear error under *Easterwood*. *See* Pet. 20-21.[3]

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[3] Respondents also suggest, Opp. 4-7, that Article 965 of the Louisiana Code of Civil Procedure prevented KCS from moving for judgment on the pleadings, because KCS had filed an answer in which it denied the allegations in plaintiffs' complaint. Article 965 states that

> Any party may move for judgment on the pleadings after the answer is filed. * * * For the purposes of this motion, all allegations of fact in the *mover's* pleadings *not denied by the adverse party* or by effect of law, and all allegations of fact in the adverse party's pleadings shall be considered true.

Article 965 is modeled after Federal Rule of Civil Procedure 12(c), the rule governing motions for judgment on the pleadings in federal court. *See* Official Revision Comments to La. Code Civ. Proc. Ann. art. 965. Under Article 965, where a defendant has denied allegations in a complaint, a *plaintiff* moving for judgment on the pleadings may not assert those facts as true, because those facts are "denied by the adverse party." *Id.*; *see Abshire* v. *W.D.L. Invs., Inc.*, 428 So.2d 1145, 1147 (La. App.) (where defendant denied allegations in complaint, judgment rescinding sale to plaintiff improper), *writ denied*, 433 So.2d 161 (La. 1983); *Thomas* v. *Allstate Ins. Co.*, 367 So.2d 1300, 1302 (La. App. 1979) (where defendant denied allegations in complaint, plaintiff could not assert them as true in motion for judgment on the pleadings); *Alexander* v. *Bates*, 192 So.2d 186, 187 (La. App. 1966) (same); *Strange* v. *Carraway*, 105 So. 225 (La. 1925). Nor may a *defendant* moving for judgment on the pleadings assert as true facts contested by a plaintiff. What respondents suggest, however, is that a defendant's denial of facts in the complaint prevents that defendant from moving for judgment on the pleadings. Nothing in La. Code Art. 965—or in the federal rule upon which Article 965 is modeled—supports that reading. Not only is respondents' technical argument wrong: the trial court did not adopt it, instead reviewing on the merits KCS's motion for judgment on the pleadings before denying the motion.

For the foregoing reasons, and for those set forth in the petition, the petition should be granted.

Respectfully submitted,

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